IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 3, 2006 Session

RANDALL BIRCHFIELD dba RANDALL BIRCHFIELD REAL ESTATE AND AUCTION v. MICHAEL L. PHILLIPS, ET AL.

Appeal from the Law Court for Washington County
No. 23124 Jean A. Stanley, Judge

No. E2005-01795-COA-R3-CV - FILED MAY 30, 2006

Randall Birchfield ("the auctioneer") operates a realty and auction business under the trade name of Randall Birchfield Real Estate and Auction. He entered into a written contract ("the auction contract") with Jimmy B. Phillips and his wife, Judy H. Phillips ("the sellers"), by the terms of which he agreed to sell at auction certain tracts of real property owned by the sellers. At the auction, Michael L. Phillips, who is Jimmy's brother, along with Michael's wife, Elizabeth Phillips ("the buyers"), were the successful bidders. The sellers and the buyers then executed a contract entitled "Offer to Purchase with Acceptance" ("the purchase contract"), which contract was also signed by the auctioneer. Despite the existence of a facially-valid contract, the buyers failed to carry through with their contractual obligations. As a consequence, the sale did not close. The auctioneer filed suit against the sellers and the buyers. The trial court held that the sellers are liable to the auctioneer for the 10% commission specified in the auction contract and for prejudgment interest at a rate of 2.25%. The auctioneer's claim against the buyers was dismissed.[1] The sellers appeal and both sides raise issues. We affirm the trial court's judgment with respect to the auctioneer's commission, but vacate the trial court's determination that 2.25% is the appropriate rate of prejudgment interest. On the subject of prejudgment interest, we remand this case to the trial court with instructions.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Law Court Affirmed In Part; Vacated in Part; Case Remanded with Instructions

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Robert D. Arnold, Johnson City, Tennessee, for the appellants, Jimmy B. Phillips and Judy H. Phillips.

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[1] While this matter was pending before us on appeal, the auctioneer filed a motion to dismiss the appeal as to the buyers. The motion recited that the parties had settled the auctioneer's claim against the buyers. Without objection, we entered an order granting the auctioneer's motion.

Kathryn J. Dugger-Edwards, Elizabethton, Tennessee, for the appellee, Randall Birchfield dba Randall Birchfield Real Estate and Auction.

OPINION

I.

On May 13, 2003, the auctioneer and the sellers all signed the auction contract, granting the auctioneer the exclusive right to sell 16 tracts of real property at an absolute auction. The auction contract is on a printed fill-in-the-blanks form. The auctioneer's logo with his trade name is printed at the top of the contract form. The auction contract, as filled in, provides that the successful bidder will pay 15% of the final sale price on the day of the auction, with the remaining balance due in "Cash Upon Closing-30 Days from Sale Date." The auction contract also provides that the sellers agree to pay the auctioneer a 10% commission, and that, should the auctioneer decide that it is appropriate, the successful bidder will be charged a 5% buyer's premium.

The auctioneer held the auction of the sellers' properties on August 2, 2003. He testified that he spent $28,798.94 of his own funds in connection with the auction. These expenses included, among other things, the printing of flyers and brochures, the renting of a location for the auction, advertisements in various newspapers, labor costs, and the cost of signs and postage. At the auction, the buyers submitted the highest bid on each of seven individual tracts. The remaining nine tracts were grouped together and the buyers made a successful bid on the grouping of $431,025. The total purchase price for the 16 tracts was $740,276.25.

There is testimony in the record that, at some point during the auction, the sellers and the buyers agreed that the sellers would provide owner financing at an interest rate of 5%.

The sellers and the buyers completed and signed the purchase contract, another fill-in-the-blanks form. It also bore the auctioneer's logo. The auctioneer also signed the document. In accordance with the auction contract, the purchase contract states that $111,041.43, *i.e.*, 15% of the total purchase price, was due as a deposit, and that the remaining $629,234.82 was due in cash at closing. Before the purchase contract was signed by the parties, the buyers advised the auctioneer that they currently had only $10,000 for a deposit. The auctioneer amended the purchase contract by handwriting the following: "Purchasers to pay $10,000 Today 8/2/2003 Balance By 9/2/2003." The parties never collectively discussed the subject of the sellers providing owner financing and it was not included as a provision in the purchase contract. The buyers never tendered the balance of the purchase price, and the sale did not close. The reason given by the buyers for not carrying through with the purchase was that they could not agree to the sellers' demand that, as a condition of the buyers being afforded owner financing, they would have to pay one-half of the sellers' income tax on their capital gain.

The auctioneer subsequently filed suit against the sellers and the buyers, alleging breach of contract, conspiracy, and intentional interference with a business relationship. The complaint seeks

$300,000 in damages and reasonable attorney's fees. The auctioneer later amended his complaint to add a claim for treble damages under Tenn. Code Ann. § 47-50-109.[2] The trial court, following a bench trial, found that the auctioneer "ha[d] not sustained his burden of proof as to his theories of conspiracy, intentional interference with a business relationship, his right to treble damages, and his action for attorney['s] fees." However, the court did find that the sellers are liable to the auctioneer for the 10% commission and awarded him a judgment in the amount of $74,027, *i.e.*, 10% of the buyers' combined bids. In addition, the trial court entered an order awarding the auctioneer prejudgment interest of 2.25%, beginning September 2, 2003, the day on which the balance of the purchase price was due. The sellers appeal.

II.

The sellers present the following issues:

> 1. Did the trial court err when it determined that the language of the auction contract providing that the auctioneer's commission was to be paid "at the close of the sale" meant the commission was due at the conclusion of the auction, rather than at the actual closing when title would be transferred and the balance of the purchase price paid?
>
> 2. Did the purchase contract modify the auction contract's terms regarding the auctioneer's commission?
>
> 3. Did the purchase contract create a liquidated damages provision, limiting the auctioneer's commission to one-half of the buyers' $10,000 deposit?

The auctioneer raises two issues:

> 1. Did the trial court err in holding that he was not entitled to an award of expenses and reasonable attorney's fees?
>
> 2. Did the trial court err by setting prejudgment interest at a rate of only 2.25%?

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[2] Tenn. Code Ann. § 47-50-109 (2001) provides as follows:

> It is unlawful for any person, by inducement, persuasion, misrepresentation, or other means, to induce or procure the breach or violation, refusal or failure to perform any lawful contract by any party thereto; and, in every case where a breach or violation of such contract is so procured, the person so procuring or inducing the same shall be liable in treble the amount of damages resulting from or incident to the breach of contract. The party injured by such breach may bring suit for the breach and for such damages.

III.

Our review of this bench trial is *de novo* upon the record of the proceedings below, but the record comes to us accompanied by a presumption of correctness as to the trial court's factual findings – a presumption we must honor unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d). Our review of the trial court's conclusions of law is also *de novo* but with no presumption of correctness attaching to the trial court's conclusions of law. ***Ganzevoort v. Russell***, 949 S.W.2d 293, 296 (Tenn. 1997).

IV.

A.

In their first issue, the sellers contend that the trial court erred when it held that the auctioneer's right to the full commission accrued when the buyers made their deposit of $10,000. They argue that the auction contract provides that the commission is not due until the point in time when the buyers pay the balance of the purchase price and the sellers deliver the deed or deeds. Thus, so the argument goes, because this "closing" never occurred, they are not liable for the auctioneer's commission.

The pertinent language in the auction contract provides as follows:

> The Seller does hereby agree to pay to Agent, *at the close of the sale* 10% percent of the gross receipts of the sale as evidenced by contracts signed by the purchasers of the different tracts or lots sold at said sale. All commissions due Agent, shall be payable in cash when the purchaser or purchasers have made the first payment or any part of the first payment.

(Underlining in original; emphasis added).

The cardinal rule in the interpretation of a contract is to "ascertain the intention of the parties and to give effect to that intention consistent with legal principles." ***Wills & Wills, L.P. v. Gill***, 54 S.W.3d 283, 286 (Tenn. Ct. App. 2001). If the contract is plain and unambiguous, its meaning is a question of law; in such a situation, it is incumbent upon the court to interpret the contract as written according to its plain terms. ***Bradson Mercantile, Inc. v. Crabtree***, 1 S.W.3d 648, 652 (Tenn. Ct. App. 1999). Language in a contract must be accorded its "usual, natural, and ordinary meaning." ***Id.*** Unambiguous language must be interpreted "as written rather than according to the unexpressed intention of one of the parties." ***Id.*** "Courts cannot make contracts for parties but can only enforce the contract which the parties themselves have made." ***Id.*** Consequently, a contract must be enforced as it is written absent fraud or mistake, even if the result of doing so would appear harsh or unjust. ***Heyer-Jordan & Assoc., Inc. v. Jordan***, 801 S.W.2d 814, 821 (Tenn. Ct. App. 1990).

In addressing this issue, the trial court found that

> [t]he [auction] contract provided that [the auctioneer]'s 10% commission would be paid at the close of the sale. Frankly, the Court could find this to mean at the conclusion of the auction or at the actual closing where title is transferred and the balance of the purchase price paid. However, the auction contract goes on to state that all commissions due shall be payable when the [buyers] have made the first payment or any part of the first payment. The first payment was made when [the buyers] deposited the $10,000.00. [The s]ellers were obligated then to pay the [auctioneer].

We agree with the trial court's interpretation of the contract. First, we note that the purchase contract provides that the auctioneer's commission was earned by "procuring [the buyers] as the purchaser[s] of said real . . . property." Thus, according to this language, the auctioneer earned his commission on the day of the auction. Furthermore, with respect to the "at the close of the sale" language in the above-quoted excerpt from the auction contract, we hold that any doubt regarding the meaning of this language is resolved by the very next sentence in the auction contract: "All commissions due [the auctioneer] shall be payable in cash when the [buyers] have made the first payment or any part of the first payment." This unambiguous language in the second sentence clearly states that the auctioneer's 10% commission was to be paid *when the buyers made their first payment*. The auction contract contemplates that the successful bidder would pay *15% of the purchase price* at the completion of, and on the day of, the auction. A contract provision providing for the payment of the auctioneer's commission at the same time is logical and dovetails nicely with the requirement that the 15% deposit be made at the end of the auction. Since the sellers were due to receive 15% of the purchase price at the end of the auction, they would then have available to them sufficient funds from the auction itself out of which to pay the auctioneer. The fact that the sellers in this case did not receive 15% of the sales price at the conclusion of the auction is immaterial. That is not the issue. The real issue is the meaning of the language in the auction contract. We hold that the auction contract clearly provides that the total commission is due and payable when the initial deposit is made. In this case, that deposit – of $10,000 – was made on the day of the sale. That is when the total commission was due and payable. The sellers' first issue is found to be without merit.

B.

The sellers next assert that, pursuant to the doctrine of merger, they are not liable for the auctioneer's commission because, in their words, the purchase contract modified and "totally changed the terms of the [auction] contract." The merger doctrine, in general terms, provides that "the last agreement concerning the same subject matter that has been signed by all parties supersedes all former agreements, and the last contract is the one that embodies the true agreement." ***Magnolia Group, Etc. v. Metro. Dev. and Hous. Agency of Nashville, Davidson County.***, 783 S.W.2d 563, 566 (Tenn. Ct. App. 1989) (citations omitted).

This issue by the sellers is based upon a false premise. It assumes that the terms of the auction contract and the purchase contract, as far as the auctioneer's commission is concerned, are inconsistent. They are not. In fact, the purchase contract is in complete harmony with the earlier-executed auction contract.

The sellers point to the following provision in the purchase contract in an attempt to support their argument that the purchase contract "totally changed" the terms of the auction contract:

> I/WE the Seller [] hereby accept the foregoing offer and agree to sell, convey and transfer said real and personal property to buyer in accordance with the terms and conditions thereof and agree to pay [the auctioneer a] commission of as agreed[3] of said purchase price for procuring Buyer as the purchaser of said real and personal property. IF Buyer defaults, [the auctioneer] shall be entitled to retain and receive one-half of all deposits deposited with [the auctioneer,] Seller or in escrow made by or on behalf of buyer on account of said purchase price[,] but said one-half shall not exceed [the auctioneer]'s commission. Seller shall be entitled to the balance of all said deposits.

(Capitalization in original). The first sentence of this provision clearly states that the "[s]eller" agrees to pay the auctioneer's commission "as agreed." This "as agreed" language can only be referring to the 10% commission in the auction contract. There is no other reasonable interpretation of this language. The sellers strenuously argue that the next sentence in the quoted material – *i.e.*, the sentence dealing with one-half of the "deposits" going to the auctioneer – somehow changes and nullifies the auctioneer's entitlement to his 10% commission. With all due respect, this argument is not persuasive. The second sentence addressing deposits only deals with the disposition of the *deposits.* It does not expressly or by implication state that this is *all* that the auctioneer is entitled to in the event of the purchaser's default.

We find that the two sentences are totally consistent. The sellers agreed to pay the auctioneer the 10% commission, which was the compensation agreed upon in the auction contract; and if, by chance, the buyers backed out of the purchase contract, which they in fact did, the auctioneer would be entitled to one-half of any deposits made by the buyers, so long as that one-half did not exceed the amount of the 10% commission. This latter provision in no way modifies the auctioneer's right to the 10% commission. On the contrary, as seen by the "as agreed" language, this quoted provision reinforces the auctioneer's right to his commission. Any payments made to the auctioneer out of deposits simply serve as a credit against the 10% commission.

[3] As previously noted, the contract was a "fill-in-the blanks" form. The "as agreed" wording was filled in.

C.

The sellers' third issue is related to their second issue. The sellers contend that the language from the purchase contract dealing with the auctioneer's right, upon the buyers' default, to one-half of the deposits equates to a liquidated damages clause, thereby limiting the damages in this case to one-half of the $10,000 deposit made by the buyers. The trial court dismissed this argument by stating that "[w]hile the [auctioneer] has the right under the [purchase contract] to retain one-half of all deposits, he is not required to do so *as his sole remedy*." (Emphasis added). We agree with the trial court.

"Liquidated damages" is a "sum stipulated and agreed upon by the parties at the time they enter their contract, to be paid to compensate for injuries should a breach occur." ***Guiliano v. Cleo, Inc***., 995 S.W.2d 88, 96-97 (Tenn. 1999) (citations omitted). Though the provision at issue clearly provides for what will happen to all *deposits* in the event the buyers default (*i.e.*, one-half will go to the auctioneer as long as it does not exceed his commission and the other one-half will go to the sellers), it does not, in any way, demonstrate that the parties mutually intended this provision to be the auctioneer's sole remedy upon default. *See* ***Loveday v. Barnes***, No. 03A01-9201-CV-0030, 1992 WL 136176, at *4 (Tenn. Ct. App. E.S., filed June 19, 1992). The subject provision does not provide, as suggested by the sellers, that one-half of the deposits is *all* that the auctioneer is entitled to.

All of the sellers' issues are found adverse to them.

V.

A.

The auctioneer argues that the trial court's judgment should be modified to include an award of reasonable attorney's fees and expenses. His claim to these additional damages is based upon his claim that the sellers breached the auction contract by changing its terms from "[c]ash [u]pon [c]losing" to "owner financing." He relies upon the following provision in the auction contract:

> In the event of any breach of any of the provisions of this Contract by Seller, the Seller hereby agrees to pay to Agent all expenses paid by Agent on behalf of Seller plus a commission of 10% of the fair market value of said property as determined by a certified appraiser plus reasonable attorney's fees for collection if collection becomes necessary.

This provision is not implicated by the facts of this case. In the instant case, there is a contract for the sale of the property and we have agreed with the trial court that the auctioneer is entitled to his full commission *based upon that contract*. The provision relied upon by the auctioneer with respect to the issue at hand contemplates a situation where, following a breach by the seller, *there is no*

contract. This can be seen from the fact that the quoted language alludes to a commission of 10% based upon "*the fair market value*" of the property. (Emphasis added). In other words, if the seller is guilty of a breach of contract and there is no sale, the seller owes the auctioneer not only the 10% commission – based, in such a situation, upon the fair market value of the property and not on the amount of a sale – but also the auctioneer's expenses and reasonable attorney's fees. In the case at bar, there was a sale and a 10% commission due based on that sale. As previously noted by us in this opinion, the facts of this case do not bring the quoted provision into play.

B.

The auctioneer next argues that the trial court erred when it limited his prejudgment interest to a rate of 2.25%. He contends that, in accordance with the auction contract and Tenn. Code Ann. § 47-14-123 (2001), he should have been awarded interest at a rate of 10%.

The auction contract provides that "[i]n the event Seller shall fail to pay any amount due and owing to [the auctioneer] upon demand, Seller agrees to pay interest at the maximum allowable rate." The term "maximum allowable rate" is not defined in the auction contract. The auctioneer asserts that Tenn. Code Ann. § 47-14-123 sets the "maximum allowable rate" for prejudgment interest at 10%. We disagree with the auctioneer's analysis; but we agree, for another reason, that the trial court erred in its approach to the subject at hand.

Tenn. Code Ann. § 47-14-123 is the appropriate starting point for the resolution of this prejudgment interest question; however, contrary to the auctioneer's argument, our inquiry does not end with that statute. Tenn. Code Ann. § 47-14-123 provides as follows:

> Prejudgment interest, *i.e.,* interest as an element of, or in the nature of, damages, as permitted by the statutory and common laws of the state as of April 1, 1979, may be awarded by courts or juries in accordance with the principles of equity at any rate not in excess of a maximum effective rate of ten percent (10%) per annum; *provided, that with respect to contracts subject to § 47-14-103, the maximum effective rates of prejudgment interest so awarded shall be the same as set by that section for the particular category of transaction involved.* In addition, contracts may expressly provide for the imposition of the same or a different rate of interest to be paid after breach or default within the limits set by § 47-14-103.

(Emphasis added). As can be seen from the italicized language, this provision refers us – in this litigation presenting a case "with respect to contracts" – to Tenn. Code. Ann. § 47-14-103 (2001), which provides as follows:

> Except as otherwise expressly provided by this chapter or by other statutes, the maximum effective rates of interest are as follows:

> (1) For all transactions in which provisions of other statutes fix a maximum effective rate of interest for particular categories of creditors, lenders, or transactions, the rate so fixed;
> (2) For all written contracts, including obligations written by and on behalf of the state of Tennessee, any county, municipality, or district in the state, or any agency, authority, branch, bureau, commission, corporation, department, or instrumentality thereof, signed by the party to be charged, and not subject to subsection (1), the applicable formula rate; and
> (3) For all other transactions, ten percent (10%) per annum.

Subsection (1) of Tenn. Code Ann. § 47-14-103(1) is clearly not applicable to the facts of this case. However, subsection (2) is directly on point. It provides that, "the maximum effective rate of interest . . . [f]or all written contracts" shall be "the applicable formula rate." While the auction contract refers to the "maximum allowable rate," we hold that this concept is the same as the concept of "the maximum effective rate of interest" alluded to in Tenn. Code Ann. § 47-14-103.

Tenn. Code Ann. § 47-14-102(2) (2001) defines the "applicable formula rate" as follows:

> "Applicable formula rate" at any given time is the greater of:
> (A) The "formula rate" in effect at such time; or
> (B) The "formula rate" last published in the Tennessee Administrative Register prior to such time, pursuant to § 47-14-105[4];

The "formula rate" is defined by subsection (6) of § 47-14-102, and states, in pertinent part, that

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[4]Tenn. Code Ann. § 47-14-105 (2001) states, in relevant part, as follows:

> (a) Upon the publication by the board of governors of the Federal Reserve System of the average prime loan rate, as described in § 47-14-102, the commissioner of financial institutions shall:
> (1) Promptly make an official announcement of the formula rate;
> (2) Cause the dissemination of such announcement to the news media in such manner as the commissioner deems appropriate; and
> (3) Cause to be published in the Tennessee Administrative Register the formula rate as determined by the average prime loan rate first published during each calendar month.
> (b) In contracting for interest pursuant to the provisions of § 47-14-103(2), any person shall be entitled to rely upon the formula rate thus announced or published by the commissioner; provided, that a formula rate shall not be deemed to have been published until seven (7) days have elapsed following the publication date stated in the issue of the Tennessee Administrative Register containing the announcement of such formula rate.

> "[f]ormula rate" means an annual rate of interest four (4) percentage points above the average prime loan rate (or the average short-term business loan rate, however denominated) for the most recent week for which such an average rate has been published by the board of governors of the Federal Reserve System, or twenty-four percent (24%) per annum, whichever is less;

The trial court seems to have based its award of prejudgment interest at the rate of 2.25% upon a letter addressed to the sellers' attorney from Mr. Phil Carriger, the regional president of People's Community Bank in Johnson City. In the letter, Mr. Carriger states that, after researching the issue, he "found that on September 2, 2003, People's Community Bank's average Certificate of Deposit rate for twenty-two months was 2.25% for the amount we discussed." In light of the foregoing statutory framework, we hold that the trial court erred in basing its determination of the appropriate interest rate on this letter. In accordance with Tenn. Code Ann. §§ 47-14-123 and 47-14-103, the "maximum effective rate of interest" under the current facts is the "applicable formula rate," as defined in the pertinent statutory scheme. We remand this case to the trial court for a proper determination of the "applicable formula rate," as defined in Tenn. Code Ann.§ 47-14-102(2), (6). The interest rate, as determined by the trial court on remand, will accrue from and after September 2, 2003.[5] The calculation of the "applicable formula rate" will be made as of the same date.

The judgment of the trial court setting prejudgment interest at 2.25% is hereby vacated.

VI.

The judgment of the trial court is affirmed in part and vacated in part. This case is remanded to the trial court with instructions as set forth in this opinion. Costs on appeal are taxed to the appellants, Jimmy B. Phillips and Judy H. Phillips.

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CHARLES D. SUSANO, JR., JUDGE

[5]The auctioneer does not challenge, on appeal, the trial court's decision to award interest from and after September 2, 2003. *Cf.* Tenn. Code Ann. § 47-14-109(c) (2001).